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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-6231

ORIGINAL COPY

DENNIS DICK,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1.

Did the Supreme Court of Georgia properly conclude on direct appeal of Petitioner's convictions and sentences that Petitioner's confession was freely and voluntarily made?

2.

Did the Supreme Court of Georgia properly conclude that the trial court did not err by not charging sua sponte the law of felony murder and voluntary manslaughter absent a timely request to charge same by Petitioner?

3.

Did the Supreme Court of Georgia correctly conclude that none of the prospective jurors were improperly excluded under the standard set forth in Witherspoon v. Illinois, 391 U.S. 510 (1967)?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-6321

DENNIS DICK,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF THE CASE

(i)

Petitioner seeks to have this Court review the decision of the Supreme Court of Georgia in Dick v. State, 246 Ga. 697, 273 S.E.2d 124 (1980), rendered on November 5, 1980, affirming Petitioner's convictions for murder and armed robbery.[1/] Sentences of death and life imprisonment were respectively imposed.

1/ A copy of the decision of the Supreme Court of Georgia is attached hereto as Respondent's Exhibit A.

Petitioner's motion for a rehearing was denied on November 25, 1980. From the denial of the aforementioned motion, Petitioner has filed this instant petition for a writ of certiorari to be directed to the Supreme Court of Georgia.

STATEMENT OF FACTS

About midnight on June 2, 1979, the body of O. C. (Red) Rider was discovered in his trailer by two men who had come there to purchase cigarettes. (T. 1081-1082, 1084, 1103). Earlier that same evening Teresa Grant, John Bolton, and Doyle Martin had driven to the victim's trailer to purchase beer. (T. 1154, 1166). Grant and Bolton testified that upon their arrival they saw a man in a parked car outside the trailer who, from his car window, pointed a shotgun at them and told them not to move or they would get hurt. (T. 1155-1156, 1166, 1168). Two men then emerged from the trailer, one of whom was identified by Bolton as Petitioner. (T. 1156, 1168-1169). Petitioner, who had a pistol, told Grant, Bolton, and Martin to get out of their car and to lie down on the ground. (T. 1157, 1169). The three did as they were directed. (T. 1157, 1169).

Petitioner and his cohorts then drove a short distance in an attempted escape, but according to Bolton the car in which the Petitioner was riding got stuck in a ditch. (T. 1170-1171). Petitioner got out of the disabled car, returned to Bolton's car, and unsuccessfully tried to start it. (T. 1172). Petitioner then ordered Grant, Bolton, and Martin to run into the woods and told them he would shoot them if they looked back. (T. 1159, 1172). The three ran into the woods as directed by Petitioner. (T. 1160, 1173).

Investigator Russell Matthews of the Dawson County Sheriff's Department, testified that the victim was found lying on the floor in the hall of the trailer. (T. 1212-1213). The victim's pockets had been pulled inside out and there was loose change scattered near the body. (T. 115, 1119, 1214). A bullet hole was discovered in the floor near the victim. (T. 1116-1117). Tire tracks and ruts were found in a culvert near the trailer. (T. 1218). An auto license plate was also found nearby. (T. 1219, 1322). A check on the license plate, according to the testimony of Sheriff John Davis, revealed the owner of the automobile to be Christopher Hoerner, one of Petitioner's co-indictees. (T. 1310-1311). This information lead police to Hoerner's trailer where Petitioner was apprehended and arrested several hours after the murder. (T. 1220-1222, 1312-1314).

The car which Petitioner and his cohorts had driven from the scene of the murder was later found without its license plate abandoned on a dirt road. (T. 1266-1267). Also found in the wooded area near the car were a Remington .38 cartridge case, a Winchester cartridge case, and a metal tackle box. (T. 1136-1137, 1271, 1274). The victim's son testified that a metal box in which his father had approximately $150.00 was missing from the trailer. (T. 1193-1194, 1197).

An autopsy performed by Warren Tillman of the Georgia State Crime Laboratory revealed that the victim had abrasions on the face and a gunshot entry wound behind the left ear. (T. 1124-1125). Tillman stated that a .38 caliber bullet recovered from the right cheek area had traveled through the brain stem from its point of entry behind the left ear. (T. 1125). The gunshot wound to the head was the cause of death. (T. 1126, 1187-1188).

Dr. David Whitcomb, who examined the victim immediately following the discovery of the body, testified that the victim had been shot either from the side or from behind. (T. 1189).

Tillman, a microanalyst, further testified that the bullet hole discovered in the floor was consistent with one that would have been made by a .38 caliber projectile. (T. 1130). Tillman also testified that the Remington and Winchester cartridge cases found by police had been fired from the same weapon, and that the bullet recovered from the victim was of the same type ammunition used in the Remington and Winchester casings. (T. 1142, 1144). No weapon was ever found by police although a search was undertaken. (T. 1282, 1324).

Following Petitioner's arrest, Petitioner was immediately advised of his rights and upon being transported to the Sheriff's Office Petitioner signed a waiver of rights form. (T. 1222, 1224, 1314, 1316). Petitioner subsequently made a taped statement in the presence of his brother, Sheriff Davis, and Investigator Matthews. (T. 1226, 1251, 1317, 1320). Prior to trial, a Jackson v. Denno hearing was held, after which the trial court ruled that Petitioner's statement had been shown to have been freely and voluntarily made and was thus admissible. (T. 978-1065).

The taped statement, which was later played for the jury, contained Petitioner's account of the events leading to the victim's death. On tape, Petitioner stated that he, Hoerner, and Webster drove to the victim's trailer following Petitioner's suggestion that they see a bootlegger. (T. 1254). On the way to the trailer, the three discussed the idea of robbing the victim. (T. 1254). Before Petitioner and Webster entered the trailer, Hoerner allegedly gave Petitioner a pistol. (T. 1254).

Petitioner stated that they asked the victim for beer, and as the victim turned around, Petitioner drew the pistol. (T. 1255). Petitioner ordered the victim to hand over his money, but the victim refused to comply. (T. 1255). According to the Petitioner, the victim "started towards me and I got scared and I pulled the trigger. I didn't mean to shoot him." (T. 1255). After the victim had been shot Webster grabbed a metal box and ran outside along with Petitioner, where they saw a car driving towards the trailer. (T. 1255-1256). Petitioner told the occupants to get out and lie down on the ground. (T. 1256). When Petitioner, Webster, and Hoerner left the scene of the murder, Hoerner drove the getaway car into a ditch where it got stuck. (T. 1257). Hoerner told Petitioner to get the other car, but while Petitioner was attempting to start the other car, Hoerner managed to get the getaway car out of the ditch. (T. 1257). Petitioner threw away the keys to the other car, and later Petitioner and his cohorts abandoned Hoerner's car on a dirt road. (T. 1257). Petitioner further admitted that he took change from the victim's pockets and that he did not see the victim with a pistol at any time during the commission of the robbery and murder. (T. 1260-1261).

According to Matthews, Petitioner also told him that Webster had thrown the metal box into the woods after telling Petitioner he had wiped off all their fingerprints. (T. 1278, 1279). Petitioner further told Matthews that he and his co-indictees had wiped their fingerprints off Hoerner's car before it was abandoned. (T. 1280).

Both Petitioner and his brother, Donald Dick, testified that Matthews told Donald Dick to urge Petitioner to confess otherwise Petitioner would receive the "chair." (T. 1342, 1385). Petitioner's brother claimed that he told Petitioner to confess so that he (Petitioner) could avoid the death penalty. (T. 1348, 1385). Petitioner stated that he gave his statement because he believed his brother and thought the confession would prevent him from receiving a death sentence. (T. 1385).

At trial Petitioner and his brother testified that Petitioner had a serious drinking problem which had grown worse over the past few years. (T. 1356, 1359, 1390). Petitioner testified that he shot the victim as the victim advanced towards him, and that he did not really mean to shoot him. (T. 1395).

Further facts will be developed as needed for a more thorough illumination of any issues presented here on this petition.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE SUPREME COURT OF GEORGIA UPON ITS REVIEW OF PETITIONER'S CONVICTIONS AND SENTENCES ON DIRECT APPEAL PROPERLY CONCLUDED THAT PETITIONER'S CONFESSION WAS FREELY AND VOLUNTARILY MADE. (Contention No. 1).

On this first contention Petitioner alleges that his confession was not freely and voluntarily made because he was too frightened to make an intelligent waiver of his constitutional rights, that the state failed to affirmatively show that he (Petitioner) stated prior to questioning that he did not want an attorney, and that Petitioner's weakened physical condition at the time of his arrest was exploited by the police in order to secure a confession.

As a prerequisite to its admission into evidence, Ga. Code Ann. § 38-411 requires that the confession of a criminal defendant be voluntarily made.

> "To make a confession admissible, it must have been made voluntarily, without being induced by another, by the slighest hope of benefit or remotest fear of injury."

The burden upon the State is to show the confession to be voluntary by a preponderance of the evidence considering the totality of the circumstances. Boulden v. Holman, 394 U.S. 478, 480 (1969). Pierce v. State, 235 Ga. 237, 239 (1975).

In this instant case a hearing pursuant to Jackson v. Denno, 378 U.S. 395 (1964), was held outside the presence of the jury to determine the voluntariness of Petitioner's confession. At the aforementioned hearing Investigator Russell Matthews of the Dawson County Sheriff's Department testified that on the evening of June 30, 1979, he took a taped statement from Petitioner at the Sheriff's Office in the presence of Sheriff John Davis, and Petitioner's brother Donald Dick. (T. 977-979). Detective Matthews testified that Petitioner was arrested at approximately 8:30 a.m. on June 3, 1979, at which time Petitioner was advised of the Miranda warnings and of his constitutional rights by Sheriff Davis. (T. 982). Petitioner was also informed that he was a suspect in a murder investigation. (T. 982). Detective Matthews further testified that at the time of arrest Petitioner was fully clothed and appeared to be only exhausted. (T. 990, 982). Detective Matthews also testified that he did not detect the odor of alcohol on Petitioner's person. (T. 983).

After being transported to the jail Petitioner was asked if he wanted to make a statement. After reading and signing a waiver of rights form Petitioner recanted and refused to make a statement, but Petitioner did ask to use a telephone. (T. 984, 982, 993-994, 997, 1000). Detective Matthews further testified that Sheriff Davis allowed Petitioner to use a telephone. (T. 984). Detective Matthews further testified that throughout his contacts with Petitioner on the day of June 3, 1979, Petitioner never asked to see or talk with an attorney. (T. 989, 990).

Upon arrest Petitioner initially contended that the police had arrested the wrong person. (T. 989). On several occasions Petitioner was asked if he wanted to make a statement, however Petitioner continued to refuse to make a statement.

During the latter part of the day on June 3, 1979, Petitioner's brother was allowed to visit. As noted by the Supreme Court of Georgia on its review of this instant case, whether a prisoner is allowed to see relatives is a significant factor bearing upon a determination of voluntariness. See Jurek v. Estelle, 623 F.2d 929 (5th Cir. 1980). The facts of this case further reveal that Petitioner was again advised of the Miranda warning and of his constitutional rights. Petitioner then gave his statement in the presence of Detective Matthews, Sheriff Davis, and his brother. Detective Matthews testified that Petitioner was not threatened, coerced, or induced into making his statement to police. (T. 979-980).

Detective Matthews further testified that he did not discuss the details of his investigation with Petitioner's brother, nor tell Petitioner's brother that if Petitioner did not confess Petitioner would receive the death penalty at trial. Detective Matthews also testified that he did nothing to frighten Donald Dick into forcing his brother (Petitioner) to confess. (T. 1005-1007, 1010-1012).

At the conclusion of the presentation of evidence on the Jackson v. Denno hearing the trial court ruled that Petitioner's confession had been shown to have been voluntarily and intelligently made. Where the State makes a prima facie showing of the voluntariness of a defendant's confession, after advisement of his or her constitutional rights as in this instant case, the confession is admissible and it is for the jury to

determine whether or not the statement was made freely and voluntarily. Boulden v. Holman, supra. Jurek v. Estelle, supra. Stapleton v. State, 235 Ga. 513 (1975). Further, unless shown to be clearly erroneous the factual determinations of the trial court should not be disturbed on appeal. See generally, Jackson v. Denno, supra. Pierce v. State, 235 Ga. 237 (1975).

B. THE SUPREME COURT OF GEORGIA PROPERLY CONCLUDED THAT THE TRIAL COURT DID NOT ERR BY NOT CHARGING SUA SPONTE THE LAW OF FELONY MURDER AND VOLUNTARY MANSLAUGHTER IN THE ABSENCE OF A TIMELY REQUEST FOR THE SAME BY PETITIONER. (Contention No. 2).

On this contention Petitioner alleges that the trial court erred by not charging sua sponte the law of felony murder and voluntary manslaughter. Counsel for the Respondent notes that an examination of the record reveals, and Petitioner here on this instant petition admits, that at trial no request to charge on these subjects were submitted. While Petitioner contends that the foregoing offenses were lesser included offenses of malice murder, the Respondent initially notes that the Supreme Court of Georgia has stated on numerous prior occasions that the failure to charge on a lesser included offense, absent a timely request for the same, is not error. Montgomery v. State, 241 Ga. 396 (1978); Jackson v. State, 239 Ga. 40 (1977); State v. Stoneaker, 236 Ga. 1 (1976).

Also, as regards Petitioner's contention that a charge on voluntary manslaughter was warranted by the evidence, an examination of Ga. Code Ann. § 26-1102 reveals that in order to warrant such a charge the evidence presented must show that the slayer acted:

(1) Solely as the result of a sudden, violent, and irresistible passion resulting from . . .

(2) serious provocation sufficient to excite such passion in a reasonable person.

Thus, in order to warrant a charge on voluntary manslaughter the evidence at trial must not only show an act of violent passion, but also some serious provocation sufficient to excite such passion in a reasonable person. Reeves v. State, 234 Ga. 896 (1975); Young v. State, 232 Ga. 285, 290 (1974); Brock v. State, 208 Ga. 318 (1951). In this instant case there was no evidence of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person. The State's evidence revealed that Petitioner deliberately shot and killed the victim during the commission of an armed robbery. At trial the Petitioner merely contended that he shot and killed the victim because the victim refused to turn over his money to the Petitioner and allegedly took several steps toward the Petitioner. Thus, as a charge on voluntary manslaughter was not warranted by the evidence the trial court did not err by not sua sponte charging the same. Joiner v. Joiner, 225 Ga. 699(5) (1969).

Here on this instant petition for a writ of certiorari Petitioner relies primarily upon this Court's decision in

Beck v. Alabama, ___U.S.___, 65 L.Ed.2d 392 (1980), in support of his contention that "because the jury was not permitted to consider a verdict of guilty to a lesser included offense and the evidence would have supported such a verdict," Petitioner's conviction for murder and sentence of death should be reversed. (Petitioner's Brief at 18). As is readily apparent upon an examination of Beck v. Alabama, supra, the same is inapplicable to the facts of this instant case. In Beck v. Alabama, supra, this Court reviewed a sentence of death imposed under a statutory scheme wherein the trial judge was "specifically prohibited from giving the jury the option of convicting the defendant of a lesser included offense." Id., at 397. As noted by this Court in Beck v. Alabama, supra, the aforementioned statutory scheme required that the jury either convict the defendant of a capital crime, in which case it is required to impose the death penalty, or acquit the defendant thus allowing him to escape all penalties for his alleged participation in the crime.

Unlike the Alabama statutory scheme reviewed in Beck v. Alabama, supra, under Georgia law there is no prohibition which prevents counsel for defendants from timely requesting a charge on the law of any lesser included offenses warranted by the evidence. In this instant case no such charges were requested, and under Georgia law the trial court is not required to sua sponte charge the same. Accordingly, the rationale applied in Beck v. Alabama, supra, is inapplicable to this instant case, and this contention is clearly without merit.

C. THE SUPREME COURT OF GEORGIA CORRECTLY CONCLUDED UPON ITS REVIEW OF THE TRANSCRIPT OF THE VOIR DIRE OF PETITIONER'S PROSPECTIVE JURORS THAT NONE WERE IMPROPERLY EXCLUDED UNDER WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1967).

On this instant petition for a writ of certiorari Petitioner contends that four veniremen were improperly excluded under Witherspoon v. Illinois, 391 U.S. 510 (1967). Accordingly, Petitioner asserts that his sentence of death should be vacated and that the Supreme Court of Georgia erred for not doing so.

In Witherspoon, supra, this Court stated that a prospective juror can be excluded for cause based upon his or her conscientious objections to the death penatly when that juror unambiguously states that he or she would automatically vote against imposition of capital punishment no matter what the evidence at trial might reveal. Maxwell v. Bishop, 398 U.S. 262, 265 (1977); Boulden v. Holman, 398 U.S. 468 (1969). Spinkellink v. Wainwright, 578 F.2d 582, 592 (5th Cir. 1978).

A reading of the transcript of the voir dire examination of the veniremen challenged on this instant petition reveals the following.

NANCY ANN MOON

"Q. Then, in your opinion, if the evidence warranted it and the law as given you in charge warranted it, from the Court's charge, you could impose the death penalty?

A. I guess I would be more for life than I would for the death penalty.

Q. My question is -- and don't let me upset you with this -- would you under any circumstances impose the death penalty?

A. No.

MR. WAYNE: I think that disqualifies her.

THE COURT: Any other questions, Mr. Davis?

MR. DAVIS: I don't think she is disqualified. She stated earlier, that under proper circumstances, she --

THE COURT: Wait a minute. You can ask her anything you want to, but I'll make the decision, Mr. Davis. Go ahead. Do you have any questions to ask her?

Q. Ms. Moore: After hearing the evidence and if you thought that the evidence absolutely demanded that you return the death penalty, could you do that?

A. That's an awful hard question.

Q. But there are some circumstances when you could return the death penalty, is that correct? Or a circumstance.

A. I guess, really, I couldn't. I really don't approve of the death penalty. I just don't think I have a right to judge.

THE COURT: Any other questions?

MR. DAVIS: No, Sir.

THE COURT: Mr. Wayne.

MR. WAYNE: If the Court please, I think under the lady's honest answers that she is disqualified and the State would so move.

THE COURT: Mr. Davis.

MR. DAVIS: I would disagree, that she is qualified.

EXAMINATION BY THE COURT

Q. Ma'am, is there any set of circumstances under which you would impose the death penalty, that you can think of?

A. That I would oppose it?

Q. No. Is there any set of circumstances in which you could give someone or let someone receive the death penalty, any circumstances that you can think of? Do you understand the question?

A. That they should receive the death penalty?

Q. Yes, ma'am. Is there any time, if you were sitting on a jury, that you would impose -- do you know what I mean when I say 'impose?' You would return a verdict giving someone the death penalty. Can you think of any time -- is there any time that you would do this?

A. I have never done it before.

Q. Is there any time -- would you do it, are you capable of doing it here this week?

A. I guess not.

MR. DAVIS: Could I ask her one more question?

THE COURT: Sure.

EXAMINATION BY MR. DAVIS

Q. Could you -- not 'would' you -- I'm not asking you if you would automatically give the man the death penalty -- but could you give a man the death penalty, or a woman, but a man in this case, would you give a man the death penalty under some circumstances, under any circumstances?

A. I guess it would really be what the situation was about, and I don't know what happened, really.

Q. We're not asking you to pre-judge, we are just asking you, under circumstances, could you give the death penalty. Could you, not would you We are not asking you to say you are going to. God knows, that is the last thing we want you to make up your mind about, whether or not you would, when you know nothing about the evidence, but could you, under proper circumstances, give a -- return a verdict of death, in any circumstances -- in some circumstances, if you were given a choice?

A. No.

Q. There is no circumstance that you can think of where you could return a death penalty verdict?

A. (No response).

Q. You seem to waiver on that point. If there is some situation, please -- you don't have to explain what it is, but are there any circumstances in the world under which you could bring back the death penalty, you could? I'm not saying you would.

A. No.

THE COURT: Any other questions?

MR. DAVIS: No, Sir.

THE COURT: The Court is going to rule that she is disqualified for cause. You may step down and please go into the jury room. What you said here, please do not repeat it. Don't discuss what you said or anyone else said in

the courtroom with anyone else.

(The juror left the courtroom)." (T. 171-175).

JANICE WINKLER HARBEN

"Q. Are you conscientiously opposed to capital punishment?

A. Yes.

Q. Would your attitude towards the death penalty prevent you from making any impartial decision as to the accused's guilt?

A. I don't think so.

Q. Would you automatically vote against the imposition of capital punishment, that is the death penalty, without regard to any evidence that might be produced on the trial of the case?

A. Ask that again, please.

Q. Would you automatically vote against the imposition of the death penalty without regard to any evidence that might be produced on the trial of the case?

A. No response.

Q. In other words, would you just automatically vote against the death penalty, regardless of what the evidence is?

A. It would be hard to say.

Q. Let's go a step further. Could you subordinate or lay aside your personal feelings on the death penalty to your oath as a juror and obey the laws of the State as charged by the Court?

A. I'm afraid -- I don't know whether I could or not.

THE COURT: Mr. Wayne.

EXAMINATION BY MR. WAYNE

Q. If I remember correctly, Ms. Harben, you stated that you are conscientiously opposed to capital punishment?

A. Yes.

Q. Could you, irregardless of being opposed to capital punishment, follow the testimony of the witnesses from the witness stand and the law that the Court gives you in charge, and follow that law, irrespective of the fact you are against capital punishment? Could you vote for it if the evidence from the witness stand said yes, and then applying that evidence -- or the charge of the Court to that evidence that you said yes to, would you still automatically vote against capital punishment?

A. Religious beliefs.

Q. Are you religiously opposed to capital punishment?

A. Yes.

Q. Then, under no circumstances, would you vote for the death penalty?

A. I don't think so.

Q. You don't think you would ever vote for it?

A. No.

MR. WAYNE: Thank you.

THE COURT: Mr. Davis.

MR. DAVIS: No questions.

THE COURT: The State's position?

MR. WAYNE: The State's position is that she should be challenged for cause.

THE COURT: Mr. Davis.

MR. DAVIS: No objections.

THE COURT: Ms. Harben, you are excused from this case. Please do not discuss what you said in here with anyone else. That includes your husband or your family or anyone. Do not allow anyone else to discuss it with you. You may go wherever, but call the Clerk's office about 6:30 and they will tell you when to report back in.

(The juror left the courtroom)." (T. 242-245).

BEVERLY DEMCAK ABBOTT

"Q. Would you automatically vote against imposing the death penalty without regard to any evidence that might be produced on the trial of the case?

A. I don't know. I believe --

Q. Before you answer that, in a case like this, there are two parts to it. In the first part, the jury determines the guilt or innocence of the defendant. If he is found innocent, of course he goes free. If he is found guilty, then we go into the second part.

In the second part, the jury determines punishment. You have two choices, life imprisonment or death.

By explaining that to you, I don't suggest what the verdict should be. This is merely expressing to you the procedure we will follow.

Now, with that explanation, would you just automatically vote against imposing or against the death penalty regardless of what the evidence was in this case?

A. I don't think I would.

Q. Could you subordinate or lay aside your personal feelings on the death penalty as provided in your oath as a juror and obey the laws of the State as charged -- given you in charge by the Court?

A. That's a pretty responsible question, if you don't know the laws.

Q. Again, could you lay aside your personal feelings about the death penalty and follow the law as given you in charge by the Court.

A. Yes, I believe I would.

Q. You said that you were conscientiously opposed to capital punishment. Is that correct? You are against capital punishment?

A. Yes, I am.

Q. Is there any circumstance or any set of facts from which you would impose the death penalty? You don't have to tell me what they are. Is there any time, if the facts and the law warranted it, that you could impose the death sentence? Ever.

A. I don't know what I would do.

Q. I realize that you are nervous and I realize these are very hard questions, and probably the first time you have ever had to work this hard thinking. I apologize for having to put you through it, but it is just one of the parts of freedom, the jury system is.

What I'm asking you is this: You said that you were conscientiously opposed to capital punishment. Taking it a step further, would you ever impose the death penalty, in any case that you can think of? You don't have to tell me what the case is, why, or anything. Just yes or no.

A. I believe I would vote against it.

THE COURT: Mr. Wayne.

MR. WAYNE: No questions.

EXAMINATION BY MR. DAVIS

Q. Can you think of a situation where you would vote along with the jurors to impose the death penalty, in any circumstance, not this case, but any case? Can you think of a situation that would warrant the death penalty.

A. I wouldn't vote for the death penalty.

Q. Did you tell the Court a moment ago that you could lay aside your personal feelings and subordinate your personal feelings and find a man guilty -- Your Honor, what was the rest of that question?

THE COURT: I'm not sure she understood it, but the question was: Could you subordinate or lay aside your personal feelings on the death penalty as required by your oath as a juror and obey the laws of the state as charged by the Court. She said she would obey the laws.

BY MR. DAVIS

Q. You said you would obey the law, as the Court charged you, and you could lay aside your personal feelings and obey the law, is that correct? By that, I don't mean to imply that you are a law breaker, in that vein.

A. I still would obey the law.

Q. You could put aside your personal feelings concerning the death penalty if it had to do with obeying the law?

A. I wouldn't vote for the death penalty.

Q. Under any circumstances? There is no circumstance in your mind that you would vote, along with the jury, for the death penalty?

A. I believe so.

Q. You don't believe so?

A. I believe I would not vote for the death penalty.

MR. DAVIS: That's all.

THE COURT: Any observations, Gentlemen?

MR. DAVIS: I agree.

THE COURT: I'm going to excuse you. The Clerk will give you a telephone number. If you will just call in, it will tell you when -- the recording will tell you when to come in.

(The juror left the courtroom)." (T. 600-604).

DAVID C. INGRAM

"Q. Are there any circumstances under which you would impose the death penalty?

A. No.

Q. Under no circumstances would you impose the death penalty?

A. I don't know whether I'm suppose to judge that or not.

Q. If you are sitting on the jury, under any circumstances would you vote to impose the death penalty?

A. No.

Q. You would not, under any circumstances?

A. No.

MR. WAYNE: That's all.

THE COURT: Mr. Davis?

EXAMINATION BY MR. DAVIS

Q. Mr. Ingram, not particularly in this case, but in any case, any case you have ever heard of, or seen, are there other cases that you could impose the death penalty? I'm not talking about this case in particular, because I realize that you don't know the facts of this case.

MR. WAYNE: That's a statement of fact that he is making to the juror. He's not asking questions.

THE COURT: Yes, sir. Ask him the question, Mr. Davis.

BY MR. DAVIS

Q. Are there any cases of any kind, not particularly this case, where you could vote along with the other jurors for the death penalty? Any crime you can think of, any situation that you have ever heard of, or you can imagine, where you would vote along with 11 or more jurors for the death penalty? I'm not asking you to prejudge this case, by any means.

A. The way it looks here, this man is sitting here, and it's kind of hard to judge.

Q. That's right, but you are not on the jury yet, though. You are being interviewed as a juror. Forget this man and think of other situations, or other times. Could you vote for the death penalty?

A. I guess not.

Q. Are you totally opposed to the death penalty?

A. No, not totally opposed.

Q. If you are not totally opposed, are there any situations, again, that you can think of where the death penalty should be imposed?

A. No, not right off.

Q. Did you understand when the Judge asked you, to begin with, if you were opposed to the death penalty?

A. I think I understood it. I'm nervous.

Q. I realize that. I sympathize with you. I would hate to be at that position, or even having to answer these questions. I think everybody here realizes you are nervous and everybody else that comes up here and answers these type of questions.

Have you, before, thought people should get the death penalty for some crimes that have been committed?

A. I've thought about it. Yes, I guess I have.

Q. Can you think of any of those situations, now, where if you were on the jury that you could be one of the people voting for that death penalty?

A. No, sir.

MR. DAVIS: That's all.

MR. WAYNE: That's cause.

THE COURT: Do you agree that's cause?

MR. DAVIS: Yes, Sir.

THE COURT: Mr. Ingram, I'm going to excuse you. I certainly appreciate you coming in. You have performed a valuable service to the county. I apologize to you for the short notice, but it was necessary that we do that.

I hope it hasn't been too inconvenient. You may be excused.

(The juror left the courtroom)." (T. 883-886).

As is apparent upon an examination of the foregoing voir dire of the four veniremen excused for cause in Petitioner's case, these veniremen were properly excluded under Witherspoon v. Illinois, supra, as they all clearly stated that they would automatically vote against imposition of capital punishment no matter what the evidence at trial might reveal. Further, an examination of Petitioner's trial counsel's responses preceding the court's excusal of veniremen Abbott, Harben, and Ingram reveal that counsel acquiesced in the court's determination that these aforementioned veniremen should be excluded for cause. Respondent contends that in addition to the fact that there exist no violation of the standards set forth in Witherspoon v. Illinois, supra, absent proof by Petitioner that he was rendered the ineffective assistance of counsel at trial Petitioner is bound by the acts of his trial counsel and should not be allowed to attack the same for the first time here on this petition for a writ of certiorari. See generally Williams v. Beto, 354 F.2d 698 (5th Cir. 1965).

For all of the above and foregoing reasons, this contention too is without merit.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia as it is manifest that no substantial federal question not previously decided by this Court is presented, and the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,

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In the Supreme Court of Georgia

Decided: NOV 5 1980

36220. DENNIS DICK v. THE STATE.

CLARKE, Justice.

The appellant, Dennis Dick, was convicted by a jury in the Superior Court of Dawson County for armed robbery and the murder of O. C. (Red) Rider. He was sentenced to death for murder and to life imprisonment for armed robbery. This case is here on direct appeal and for mandatory review of the death sentence.

SUMMARY OF FACTS

From the evidence presented at trial, the jury was authorized to find the following facts:

The appellant was a resident of Hall County and was familiar with the business establishment operated by the victim, O. C. (Red) Rider, in Dawson County. The victim had acquired a reputation as a bootlegger and was well known throughout Dawson County. Together with Bill Webster and Christopher Hoerner, appellant had been drinking, and about 9:00 p.m. on June 2, 1979, the three companions left in a car belonging to Hoerner for the purpose of getting more beer. As they traveled toward the victim's place of business, the three men formulated a plan to rob the victim. The

familiarity of appellant with the victim's place of business was illustrated by the fact that he directed the driver to the location.

Upon arriving at the trailer in which the victim operated his business, Hoerner gave a pistol to appellant, and appellant and Webster entered the trailer. Finding the victim to be alone, the two men bought a six-pack of beer and paid for it. As the victim turned around, appellant pulled the pistol and told him to freeze and give him his money.

Appellant in his statement admitted shooting the victim one time but told authorities that he did so only when the unarmed victim advanced upon him after refusing to turn over the money. Forensic evidence, however, established that the victim was shot behind the left ear with a 38 caliber pistol. There was also evidence of bruises and abrasions on the victim's forehead and left cheek. When the victim was found, he was lying face down in a hallway of the trailer and was not near the counter where the beer was sold. In addition, a bullet hole was found in the floor next to the victim's head bearing out testimony of witnesses that two shots and not one had been heard. The victim's pockets were turned inside out, and the telephone was found torn from the wall.

While the robbery was still in progress, John Bolton, Doyle Martin and Teresa Grant drove up to the trailer. As they stopped,

Christopher Hoerner, who was acting as lookout, stuck a shotgun out the window of his car and told the three not to move. When Webster and appellant ran out of the victim's trailer, appellant ordered the three out of the car at gun point and told them to lie on the ground. The two robbers then got back into their car to flee but ran the car into a ditch. At this point, appellant returned and told the three persons lying on the ground to run into the woods and not look back or he would kill them. Having chased away the witnesses, appellant attempted to crank their car but was unable to do so. The three robbers were finally able to flee, however, when Hoerner and Webster finally freed their car from the ditch. At about this time, Terry Allen arrived upon the scene and saw someone running across the yard to the car used by the robbers. He went inside the trailer and discovered the body of the victim and contacted the authorities. Appellant and his co-defendants abandoned the car in which they were fleeing after it broke down. Local law enforcement authorities traced the car to its owner through its tag which had been torn off when it went into the ditch. This information subsequently led authorities to the appellant, and he was arrested the next day after he had walked most of the way to Hoerner's trailer from where the car was abandoned. The other two co-defendants were subsequently arrested also. A metal money box was recovered, but the murder weapon was never found.

ENUMERATIONS OF ERROR

(1) The appellant in his first enumeration of error complains that the trial court erred in failing to grant a change of venue. The appellant argues that because of pre-trial publicity and local knowledge of the crime, it was impossible to obtain an impartial jury.

At the outset, we note that the record contains no evidence of prejudicial pre-trial publicity. Appellant concedes that there is no evidence of a "total inundation of the judicial process by the media." Sheppard v. Maxwell, 384 U.S. 333 (86 SC 1507, 16 LE2d 600) (1966); Estes v. Texas, 381 U.S. 532 (85 SC 1628, 14 LE2d 543) (1965).

Rather, appellant relies upon the fact that each prospective juror had heard something about the case. However, each prospective juror not struck for prejudice expressly indicated that he or she could lay aside any opinion he or she had formed and render a sentence based solely upon the evidence. Tucker v. State, 244 Ga. 721 (261 SE2d 635) (1979); Collier v. State, 244 Ga. 553 (261 SE2d 364) (1979); Irvin v. Dowd, 366 U.S. 717 (81 SC 1639, 6 LE2d 751) (1960).

The victim was well known in the community but this alone does not indicate that the jury drawn from that community is death prone. Collier v. State, supra.

The record in this case shows that 120 prospective jurors were examined. The appellant was allowed an additional 10 strikes and the state an additional 5. The jurors were examined outside the presence of each other. See Collier v. State, supra. Of these jurors, 49 were excluded for normal cause (prohibited degree of relationship to the victim or prosecutor, unalterable opposition to the death penalty, etc.). Thirteen were excused for prejudice or a fixed opinion as to guilt or innocence. This low percentage of veniremen excused for prejudice (approximately 10%) strongly corroborates the expressions of impartiality by the other jurors who were not excused for prejudice. Murphy v. Florida, 421 U.S. 794 (95 SC 1555, 43 LE2d 772) (1974); Tucker v. State, supra (5% dismissal rate corroborates absence of prejudicial bias); Collier v. State, supra (20% dismissal rate corroborates absence of prejudicial bias); Coleman v. State, 237 Ga. 84 (226 SE2d 911) (1976) (46% dismissal rate corroborates absence of prejudicial bias); Butler v. State, 231 Ga. 276 (201 SE2d 448) (1973) cert. denied, 420 U.S. 907 (1974) (36% dismissal rate corroborates absence of prejudicial community bias); cf. Irvin v. Dowd, supra (62% dismissal rate corroborates actual juror partiality).

Furthermore, the appellant failed to exhaust all of his preemptory challenges. Coleman v. State, supra; Davis v. State, 241 Ga. 376 (247 SE2d 45) (1978). We also note that the state

presented an overpowering and overwhelming mass of evidence, on the question of appellant's guilt. The appellant did not dispute such evidence and in fact admitted under oath that he was the triggerman. Under this evidence, no other verdict could have been returned by a rational trier of fact. See Coleman v. State, supra; Jackson v. Virginia, 443 U.S. 307 (99 SC 2781; 61 LE2d 560) (1979).

A motion for change of venue lies within the sound discretion of the trial judge. Coleman v. State, supra; Allen v. State, 235 Ga. 709, 712 (221 SE2d 405) (1975); Jarrell v. State, 234 Ga. 410 (216 SE2d 258) (1975). We find no abuse of discretion here.

Appellant also asserts that certain jurors were improperly excused in violation of the rule of Witherspoon v. Illinois, 391 U.S. 510 (88 SC 1770; 20 LE2d 776) (1968). However, each such prospective juror upon voir dire responded that he or she could not impose the death penalty under any set of circumstances. The jurors' responses satisfied the test set forth in Witherspoon, supra, as reiterated in Lockett v. Ohio, 438 U.S. 586 (98 SC 2954; 57 LE2d 973) (1978). Hance v. State, 245 Ga. 856 (___ SE2d ___) (1980); Collier v. State, supra; Harris v. Hopper, 243 Ga. 244 (253 SE2d 707) (1979).

(2) In his second enumeration of error, the appellant asserts that his confession was not freely and voluntarily given.

Immediately after his arrest, the appellant was taken to the sheriff's office where he signed a waiver of rights. However, he made no statement at that time. Some ten hours later, in the presence of his brother, and after conferring with his brother, he gave local authorities a complete confession. The trial court, after a Jackson v. Denno hearing, admitted the confession, holding it to have been made freely and voluntarily. Appellant argues that but for the urging of his brother with whom he consulted, he would not have confessed. The appellant's brother told him that if he did not confess, he would get the death penalty.

A confession otherwise admissible is not inadmissible because it was prompted by advice of a relative of the defendant. Shavers v. State, 244 Ga. 491 (260 SE2d 883) (1979).[1/]

The appellant further argues that the initial waiver of rights signed the morning of his arrest was not a knowing waiver in that he was tired, hungry, withdrawing from alcohol and emotionally upset at that time

The state introduced evidence that appellant was not drunk nor in such a condition as to be unable to understand the consequences of his action. Moreover, the statement was not taken immediately

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1/ Whether a prisoner is allowed to see relatives is significant in a determination of voluntariness. See Jurek v. Estelle, ___F2d ___ (5th Cir., decided August 11, 1980).

after the arrest but some ten hours later, after appellant consulted with his brother and was again advised of his rights. It is clear from the taped confession that the confession was voluntary. The ten-hour lapse between the time of the waiver and the actual confession at which time the previous warnings were reiterated did not render the confession inadmissible. Stapleton v. State, 235 Ga. 513 (220 SE2d 269) (1975).

Appellant also argues that his brother's advice to confess was the result of an investigator's conversation in which his brother was told to convince appellant to confess or he would face a death penalty. The investigator testified that he never had such a conversation with the appellant's brother and that appellant did not ask to consult with an attorney. This conflict in the evidence was resolved by the trial court in favor of admissibility, and we find no error in the trial court's determination. McClesky v. State, 245 Ga. 108 (263 SE2d 146) (1980); Burney v. State, 244 Ga. 33 (257 SE2d 543) (1979); Amadeo v. State, 243 Ga. 627 (255 SE2d 718) (1979); Johnson v. State, 233 Ga. 58 (209 SE2d 629) (1974).

We also note in this regard that on direct examination during the guilt-innocence phase of the trial, the defendant reiterated his confession and admitted his guilt. Therefore, L.C. v. State, 151 Ga.App. 307 (259 SE2d 702) (1979), cited by appellant, is

inapplicable. This enumeration of error is without merit. Appellant's confession being freely and voluntarily given, appellant's contention that tangible evidence obtained as a result of the confession was improperly admitted is similarly without merit.

(3) In his third and eleventh enumerations of error, the appellant argues general grounds. We find that the evidence in this case overwhelmingly supports a finding of the guilt of the accused by a rational trier of fact beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (99 SC 2781; 61 LE2d 560) (1979). These enumerations are without merit.

(4) During the Jackson v. Denno hearing, outside the presence of the jury, the trial judge questioned the defendant as to the presence of telephones in the sheriff's office. Appellant contends that the trial court thereby assisted the prosecution and improperly interfered with the trial of the case. Similarly, appellant complains that at other times during the trial, the trial judge improperly admonished defense counsel. Enumeration of errors 4 and 14 are without merit. Cape v. State, ___ Ga. ___ (Case No. 36298, decided Oct. 7, 1980); Dyke v. State, 232 Ga. 817 (209 SE2d 166) (1974); Wilson v. State, 229 Ga. 224 (190 SE2d 78) (1972).

(5) In his fifth enumeration of error, the appellant contends that the trial court erred in allowing the appellant's confession in evidence in that by doing so, the appellant became a witness against himself, and the appellant was not listed as a witness on the list of witnesses furnished to the appellant. The appellant cites no authority other than the statute itself. Ga. Code Ann. § 27-1403. The purpose of the statute is to "insure that the accused is confronted with testimony against him from witnesses whom he has not had an opportunity to interview prior to trial." Herring v. State, 238 Ga. 288 (232 SE2d 826) (1977). This enumeration of error is without merit.

(6) During voir dire, over objection, the daughter and son of the victim were allowed to remain in the courtroom and assist the prosecution. Appellant alleges error and argues that the court's own order granting a sequestered voir dire was thereby violated. However, the court's order by its terms allowed additional persons to remain during voir dire as the court deemed necessary. The control over such matters necessarily rests within the sound discretion of the trial court and unless that discretion is abused, it will not be controlled by the appellate courts. White v. State, 230 Ga. 327 (196 SE2d 849) (1973). In this case, contrary to appellant's position that the court's action prejudiced

him, in at least one instance, the daughter of the victim was able to inform the court as to persons on the jury who were related to the victim within the prohibited degree. We note that this is a problem in jury selection in some rural counties. A review of the voir dire (see Division 1, supra) disclosed very frank answers regarding prejudice by the prospective jurors. No indication appears on the record nor does appellant demonstrate any prejudice due to the presence of the members of the family during voir dire. Enumeration of Error 6 has no merit.

(7) Under the evidence in this case, appellant was the triggerman and actively participated in the armed robbery including receiving some of the proceeds. There is no merit in the contention that in this case the armed robbery was, as a matter of law or a matter of fact, a lesser included offense of the malice murder. See Hoerner v. State, ___ Ga. ___ (Case 36305, decided September 5, 1980); Pell v. State, 239 Ga. 146 (236 SE2d 47) (1977); Barrow v. State, 235 Ga. 635 (221 SE2d 416) (1975).

(8) In his eighth enumeration of error, appellant contends that the trial court erred in failing to give defendant's request to charge number two.

Defendant's request to charge was as follows: "... generally intoxication or drunkeness is not a defense to a crime, however,

if prolonged drunkeness causes a permanent mania or insanity, then an insanity defense may be used."

No special or general plea of insanity was filed; the defendant instead entered a general plea of not guilty. See Taylor v. State, 245 Ga. 501 (265 SE2d 803) (1980); Lewis v. State, 239 Ga. 732 (238 SE2d 892) (1977); Ross v. State, 217 Ga. 569 (124 SE2d 280) (1962).

The request is not a complete statement of law, and the trial court did not err in failing to charge the request. Peek v. State, 155 Ga. 49 (116 SE2d 629) (1922); Strickland v. State, 137 Ga. 115 (72 SE2d 922) (1911); Ross v. State, supra.

The trial court adequately charged the jury as to voluntary intoxication. Testimony that the appellant began drinking at an early age and sometimes did not remember what happened does not raise an issue of insanity. See Lewis v. State, supra.

Appellant further argues that the court erred in failing to charge his requests to charge in the sentencing phase of the trial. We find no error. Mitigating circumstances are not required to be singled out. Collins v. State, 243 Ga. 291 (253 SE2d 729) (1979). The trial court adequately charged as to Fleming v. State, 240 Ga. 142 (240 SE2d 37) (1978) and Hawes v. State, 240 Ga. 327

(240 SE2d 833) (1978). Failure to instruct in the exact language requested is not error. Pollard v. State, 236 Ga. 587 (237 SE2d 524) (1976). Appellant's sixth request to charge, to wit: "Aggravating circumstances must be outrageously and wantonly vile in that they involve torture to the victim and depravity of mind on the part of the defendant" is an incorrect statement of law, and the court did not err in refusing to so charge. Ga. Code Ann. § 27-2534.1 et seq. Hance v. State, supra.

Appellant's requests to charge that if the jury could not reach a verdict, the trial court would impose a life sentence and that the law presumes a life sentence means that the defendant shall spend the remainder of his natural life in the penitentiary are clearly not principles of law to be given in a charge to a jury and were properly refused.

(9) The appellant in his ninth enumeration of error contends that the trial court erred in admitting state exhibits 2 through 4, 8, 10, 13, 14, 16 through 18, and 20 through 28 in that they are fruits of the poison tree, i.e. a product of an illegal confession. The confession having been determined to be properly admitted, appellant's argument is without merit. See Division 2, supra. Appellant further contends that some of the state exhibits were erroneously admitted over proper objection. Exhibits 2 and 3, photographs of the victim, were admitted over objection. The

remainder of the exhibits were admitted without objection.

It is well settled that photographs, which are relevant and material to issues in the case, need not be excluded on the grounds that they would inflame the minds of the jurors or are corroborative or cumulative of other grounds. Tucker v. State, 245 Ga. 68 (263 SE2d 109) (1979); Mooney v. State, 243 Ga. 373 (254 SE2d 337) (1979). Each photograph depicted the location of the wound, the crime scene and the way in which the victim had been robbed. As such, photographs were material, and the trial court did not err in admitting them into evidence.

(10) In his tenth and seventeenth enumerations of error, the appellant asserts that the trial court erred in admitting the testimony of Dr. Whitcomb and other forensic evidence over objection. Appellant argues that since the cause of death had been stipulated, the testimony of Dr. Whitcomb, who had examined the body of the victim, was prejudicial and inflamed the minds of the jury. The evidence complained of was relevant testimony as to cause of death and the location of the wound, the location of the wound being a crucial part of the state's case. The trial court did not err in admitting the testimony. Relevant evidence cannot be kept from the jury by admission of the fact or waiver of the requirement of proof. Franklin v. State, 245 Ga. 141

(263 SE2d 666) (1980).

(11) In his eleventh enumeration of error, appellant contends that the trial court erred in not instructing the jury as to voluntary manslaughter or felony murder. The trial judge charged the jury as to the crime specified in the indictment, malice murder. Since there is no requirement that a charge on a lesser included offense be given in the absence of a written request, this enumeration is not meritorious. Lamb v. State, 245 Ga. 104 (263 SE2d 143) (1980); Thomas v. State, 243 Ga. 217 (253 SE2d 190) (1979); State v. Stonaker, 236 Ga. 1 (222 SE2d 354) (1976).

(12) Appellant's enumerations of error 12 and 20 through 22 deal with sentence and will be considered in the sentence review portion of the opinion.

(13) In the appellant's thirteenth and fourteenth enumerations of error, he contends that the tape recordings of his confession were improperly admitted into evidence. When the state sought to introduce appellant's taped confession, defense counsel objected on the ground that the proper foundation had not been laid. The trial court instructed counsel to perfect his objection and state what the proper foundation should be. Counsel did not comply. Objection on the ground of a lack of proper foundation without stating what the proper foundation should be is insufficient and presents nothing for consideration on appeal. Newman v. State,

239 Ga. 329 (236 SE2d 673) (1977); Dillard v. State, 128 Ga.App. 747 (197 SE2d 924) (1973). However, pretermitting waiver, this court has examined the record and concludes that the proper foundation for the use of the tapes was laid. Harris v. State, 237 Ga. 718 (230 SE2d 1) (1976); Brooks v. State, 141 Ga.App. 725 (231 SE2d 828) (1977); Solomon, Inc. v. Edgar, 92 Ga.App. 207 (83 SE2d 167) (1955). The record in this case affirmatively shows that the mechanical transcription device was capable of taking testimony, that the operator of the device was competent to operate it, and that no changes, additions, or deletions had been made to the tape. Furthermore, the manner of preservation was shown; the speakers were identified, and the testimony elicited was freely and voluntarily made without duress. See Division 2 herein. In addition, appellant argues that portions of the tape were improper and were not part of the appellant's statement but prejudicial assumptions of the interrogator.

During the interrogation, the officers asked appellant if he had struck the victim. Appellant denied striking the victim. Forensic evidence established bruises on the victim's face. The question was relevant to the inquiry. No prejudice having been shown, this argument is without merit.

(14) The state called the victim's son as a witness. He had been the second person to see the victim after the murder. In

addition, the son worked in the victim's place of business and had knowledge of the amount of receipts. During direct examination, the witness became emotional and began to weep. A recess was taken, and the witness was able to compose himself. The defense counsel moved for a mistrial on the grounds that the state intentionally caused such an emotional outburst and that the defendant was prejudiced thereby. The motion for mistrial was overruled, and we find no error. The emotional outburst in this case consisted of the witness crying. There is no evidence in the record that the witness became hysterical or made any prejudicial comments or threats in the courtroom. The record simply does not support appellant's contention that this witness was placed on the witness stand by the state for the sole purpose of prejudicing the defendant. Furthermore, such emotions are reasonably expected by one who is a close relative of a murder victim. The trial court did not abuse its discretion in failing to grant appellant's motion for mistrial. "Many, if not most, trials by jury involve some degree of emotion by at least one party or the other. It would be unreasonable to expect that all emotions be completely frozen during a trial by jury when such effective bridle on emotions cannot be sustained elsewhere." Associated Distributors, Inc., v. Strozier, 144 Ga.App. 205, 206 (240 SE2d 761) (1977).

Demonstrations and outbursts which occur during the course of a trial are matters within the trial court's discretion unless a new trial is necessary to insure a fair trial. Sheppard v. State, 235 Ga. 89 (218 SE2d 830) (1975). Here the trial court stopped the trial and allowed the witness to compose himself, and it is unlikely that the witness' crying without more prejudiced appellant's defense. Compare Futch v. State, 151 Ga.App. 519 (260 SE2d 520) (1979) with Price v. State, 149 Ga.App. 397 (254 SE2d 512) (1979).

(15) In his eighteenth enumeration of error, the appellant asserts that the trial court erred in failing to grant a mistrial as a result of improper actions, remarks and statements of the district attorney during the trial and in his closing argument. In one instance, the district attorney in cross examining the defendant's brother remarked to the witness, "I wouldn't think they would electrocute me, if I wasn't entitled to it." The defense counsel moved for a mistrial on the grounds that the district attorney was speaking with the witness and not questioning him. The motion was denied, but corrective instructions were given. The decision of whether to grant a motion for mistrial lies within the sound discretion of the trial judge, and his judgment will not be disturbed on appeal absent a showing of abuse of discretion. Sims v. State, 243 Ga. 83 (252 SE2d 501) (1979);

Patterson v. State, 239 Ga. 409 (238 SE2d 2) (1977). Under the circumstance of this case, we find no abuse of discretion.

(16) On direct examination, appellant admitted a prior conviction for statutory rape. He went into the particulars of that offense in an obvious effort to show the jury he had not been convicted of a crime of violence. Appellant contends that the trial court erred in allowing the prosecution on cross examination to go into prejudicial aspects of the prior conviction of the defendant. We do not agree. The prosecutor's questioning sought to show that the defendant used the same defense in the statutory rape conviction as he now was attempting to assert. Each party has the right to a thorough and sifting cross examination of the opposing witness. Ga. Code Ann. § 38-1705. The trial court has the discretion to determine the scope of cross examination, and in the absence of abuse of that discretion, the action of the trial judge will not be disturbed. Ruffin v. State, 243 Ga. 95 (252 SE2d 472) (1979). Enumeration of Error 16 is without merit.

(17) In his last enumeration of error, appellant asserts that the trial court erred in admitting the indictment of a previous felony committed by the defendant at the presentence hearing since there was no showing that the defendant was represented by counsel or that he intelligently waived his right to counsel.

However, the defendant on direct examination during the trial of the case brought out the conviction of the previous felony and admitted that he had committed that crime. Furthermore, the indictment for the prior felony was admitted without objection and shows upon its face that the appellant was represented by counsel. This enumeration is wholly without merit.

SENTENCE REVIEW

As required by Georgia Law 1973, p. 159, et seq. [Code Ann. § 27-2537(c)(1-3)], we have reviewed the death sentence in this case. We have considered the aggravating circumstances found by the jury, the evidence concerning the crime, and the defendant pursuant to the mandate of the statute. We conclude that the sentence of death imposed in this case was not imposed under the influence of passion, prejudice, or any aribtrary factor. See Division 1 herein.

The jury found the following aggravating circumstance: The offense of murder was committed while the offender was engaged in the commission of another capital felony, to wit: armed robbery. Code Ann. § 27-2534.1(b)(2).

During the guilt/innocence phase of the trial, the jury found the defendant guilty of armed robbery. We find the evidence factually substantiates and supports the finding of the statutory

aggravating circumstance, the finding of guilt, and sentence of death by a rational trier of fact beyond a reasonable doubt. Jackson v. Virginia, supra.

(18) The appellant contends in Enumeration 20 that the jury should not have been allowed to reach a verdict of a death sentence as no new evidence was introduced by the state during the sentence phase of the trial. However, the state necessarily under the facts of this case introduced during the guilt/innocence phase of the trial all of the evidence required to support the finding of the aggravating circumstance returned by the jury. This enumeration of error is without merit. See Spivey v. State, 241 Ga. 477 (246 SE2d 288) (1978).

(19) In his twenty-second enumeration of error, the appellant contends that the trial court's charge during the sentencing phase of the trial was unjustly weighted toward the state and the death penalty, in that undue weight and emphasis was placed on aggravating circumstances and too little on mitigating circumstances. Appellant argues that the trial court's charging of the three aggravating circumstances upon which the state sought the death penalty was prejudicial. We do not agree. The charge of the court complied with the standards set forth in Spivey v. State, supra; Fleming v. State, supra, and Hawes v. State, supra.

See Jones v. State, 243 Ga. 820 (256 SE2d 907) (1979) and Fleming v. State, 243 Ga. 120 (252 SE2d 609) (1979).

Appellant's co-defendant, Christopher Hoerner, was sentenced to life imprisonment. See Hoerner v. State, Case 36305, decided September 5, 1980. The question thus presented is whether appellant's sentence is disproportionate considering the crime and the defendant in light of the lesser sentence imposed on a co-defendant.

There is no simplistic rule that a co-defendant may not be sentenced to death when another co-defendant receives a lesser sentence. McClesky v. State, 245 Ga. 108 (263 SE2d 146) (1980); Collins v. State, 243 Ga. 291 (253 SE2d 729) (1979). Each case is evaluated on its own unique factual circumstance.

As in McClesky v. State, supra, we find material distinctions between appellant's case and the case of the other co-defendant. First, the appellant was the actual perpetrator of the murder, whereas the other defendant was not in the immediate area of the killing but was stationed outside as a lookout. Juries under similar circumstances have sentenced triggermen to death while the same penalty has not been imposed on co-defendants. These cases have been affirmed by this court. Goins v. State, 245 Ga. 62 (262 SE2d 818) (1980); Ross v. State, 233 Ga. 361 (211 SE2d 356)

(1974); Dobbs v. State, 236 Ga. 427 (224 SE2d 3) (1976); Pulliam v. State, 236 Ga. 460 (224 SE2d 8) (1976); Bowden v. State, 239 Ga. 821 (238 SE2d 905) (1977).

Contrary to appellant's position, this case is not controlled by the recent United States Supreme Court decision of Godfrey v. Georgia, 27 CrL 3115, 48 USLW 4541 (U.S., May, 1980). In Godfrey the court was concerned with a sentence of death resting exclusively on Code Ann. § 27-2534.1(b)(7). The other statutory aggravating circumstances are more "specific and measurable." Godfrey v. Georgia, supra.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. The evidence shows that this was the intentional killing of an unarmed victim of an armed robbery. It was a coldblooded killing perpetrated solely for the purpose of monetary gain. We find that the following similar cases listed in the Appendix support affirmance of the death penalty. Appellant's sentence to death for murder is not excessive or disproportionate to the sentence imposed in similar cases considering the crime and the defendant.

Judgment affirmed. All the Justices concur.

APPENDIX

(1) LINGO v. STATE, 226 Ga. 496 (175 SE2d 657) (1970)
(2) JOHNSON v. STATE, 226 Ga. 511 (175 SE2d 540) (1970)
(3) PASS v. STATE, 227 Ga. 730 (182 SE2d 779) (1971)
(4) HUNTER v. STATE, 231 Ga. 494 (202 SE2d 441) (1973)
(5) GREGG v. STATE, 233 Ga. 117 (210 SE2d 659) (1974)
(6) MOORE v. STATE, 233 Ga. 861 (213 SE2d 829) (1975)
(7) FLOYD v. STATE, 233 Ga. 280 (210 SE2d 810) (1974)
(8) PREVATTE v. STATE, 233 Ga. 929 (214 SE2d 365) (1975)
(9) MITCHELL v. STATE, 234 Ga. 160 (214 SE2d 900) (1975)
(10) TAMPLIN v. STATE, 235 Ga. 20 (218 SE2d 779) (1975)
(11) BERRY HILL v. STATE, 235 Ga. 549 (221 SE2d 185) (1975)
(12) BARROW v. STATE, 235 Ga. 635 (221 SE2d 416) (1975)
(13) BROWN v. STATE, 235 Ga. 644 (220 SE2d 922) (1975)
(14) DOBBS v. STATE, 236 Ga. 427 (224 SE2d 3) (1976)
(15) ARNOLD v. STATE, 236 Ga. 534 (224 SE2d 386) (1976)
(16) PULLIAM v. STATE, 236 Ga. 460 (224 SE2d 8) (1976)
(17) HAWES v. STATE, 240 Ga. 327 (240 SE2d 833) (1977)
(18) CORN v. STATE, 240 Ga. 130 (240 SE2d 694) (1977)
(19) AMADEO v. STATE, 243 Ga. 627 (255 SE2d 718) (1979)
(20) JONES v. STATE, 243 Ga. 820 (256 SE2d 90) (1979)
(21) HAMILTON v. STATE, 244 Ga. 145 (259 SE2d 81) (1979)
(22) COBB v. STATE, 244 Ga. 344 (260 SE2d 60) (1979)
(23) DAMPIER v. STATE, 245 Ga. 427 (265 SE2d 565) (1980)